



## ***CITY COUNCIL AGENDA REPORT***

---

**MEETING DATE: JUNE 4, 2013**

**ITEM NUMBER:**

**SUBJECT: NEWPORT BANNING RANCH TRAFFIC MITIGATION AGREEMENT**

**DATE: MAY 9, 2013**

**FROM: PLANNING DIVISION/DEVELOPMENT SERVICES DEPARTMENT**

**PRESENTATION BY: PETER NAGHAVI**

**FOR FURTHER INFORMATION CONTACT: MINOO ASHABI, PRINCIPAL PLANNER  
(714) 754-5610;  
minoo.ashabi@costamesaca.gov**

---

### **RECOMMENDATION**

1. Approve the "Revised Traffic Mitigation Agreement" between the City of Costa Mesa and Newport Banning Ranch, LLC for mitigation of traffic impacts associated with the proposed Newport Banning Ranch Project within the sphere of influence of the City of Newport Beach (Attachment 1).
2. Authorize the Mayor to execute the Traffic Mitigation Agreement.

### **BACKGROUND**

Newport Banning Ranch, LLC (the developer) is proposing the development of a mixed-use project in a portion of the Banning Ranch property, which is located largely in unincorporated County of Orange within the sphere of influence of the City of Newport Beach.

The proposed Banning Ranch land use development plan includes 1,375 single and multi-family residential units (comprised of 952 residential condominiums and townhouses and 423 single family residences), 75,000 square feet of neighborhood commercial, a 75-room resort hotel, and various park amenities. A significant concentration of this development, including over 700 multi-family units and 75,000 square feet of neighborhood commercial uses, is proposed in the eastern edge of the Banning Ranch property at the current terminus of 17<sup>th</sup> Street at the City of Costa Mesa's west boundary. The project also proposes a north-south roadway connecting 19<sup>th</sup> Street and Pacific Coast Highway through the Banning Ranch property. Access points to the Banning Ranch property include Pacific Coast Highway, 15<sup>th</sup> Street, 16<sup>th</sup> Street, 17<sup>th</sup> Street, and potentially 19<sup>th</sup> Street. The site plan for the proposed project is shown in Attachment 2.

The proposed Newport Banning Ranch project is expected to generate 14,989 daily trips, with each trip representing a one-way vehicle movement, either to or from the project site. Of these, 906 trips are projected to be generated during the morning peak hour and 1,430 trips are projected to be generated during the evening peak hour. The City of Costa Mesa worked with City of Newport Beach staff in arriving at the above trip generation as well as the distribution of trips to the roadway network. It is projected that approximately 65% of project traffic would utilize the City of Costa Mesa's roadway system for access. The project-proposed connections to Costa Mesa are at 16<sup>th</sup> Street, 17<sup>th</sup> Street, and 19<sup>th</sup> Street, with 17<sup>th</sup> Street providing a major access gateway.

The traffic analysis for the DEIR (Draft Environmental Impact Report) included 13 intersections in Newport Beach, 9 intersections in Huntington Beach, and **31 intersections in Costa Mesa**. The DEIR identified impacts at seven (7) intersections within the City of Costa Mesa. The mitigation measures are required at the time of project build out and not during the initial phases. While mitigation measures were identified at the impacted locations, the City of Newport Beach has limited authority to condition them on the development as they are outside of their jurisdiction.

### *Project's Approval Process*

The Banning Ranch development project was approved by City of Newport Beach Planning Commission and the City Council on June 21, 2012 and July 23, 2012 respectively. The approval included the following:

- a) Certification of the Final Environmental Impact Report No. ER 2009-002 (SCH No. 2009031061),
- b) General Plan Amendment and adopting a Statement of Overriding Considerations
- c) Project Master Plan
- d) Tentative Tract Map
- e) Affordable Housing Implementation Plan; and
- f) Newport Banning Ranch Mitigation Monitoring and Reporting Program

The Newport Banning Ranch project does not legally require approval from the City of Costa Mesa. However, the project requires approval from the California Coastal Commission, in addition to other state and federal agencies. The California Coastal Commission review of the project is anticipated to take approximately 14 months. An application has been filed with the California Coastal Commission in early February. It is anticipated that the hearing will be completed by end of the year or early 2014. The following notes the request in detail:

- **Coastal Development Permit Application 5-13-032, Newport Banning Ranch.** Proposing to develop approximately 400 acre site including consolidation of existing oil production facilities, contaminated soil remediation, grading, land division, bluff stabilization, new road network, 1,375 residential units, 75,000 square feet of commercial space, 75 unit resort inn, 52 acres of parks, public trails, and habitat restoration and preservation

## **ANALYSIS**

### **Traffic Mitigation Agreement**

The attached Traffic Mitigation Agreement was formulated based on the project EIR, its traffic impacts, and resulting mitigations. City of Costa Mesa staff developed preliminary cost estimates for the improvements required to mitigate the identified impacts. Based on a detailed analysis, and extensive negotiations, staff determined that the proposed traffic mitigation fee of \$4,388,483 is justified and commensurate with the traffic impacts expected from the Newport Banning Ranch development at build out. This mitigation fee which is approximately 2½ times more than the amount that the City could impose on a typical developer in Costa Mesa under the Traffic Impact Fee program represents the Newport Banning Ranch development's share of the identified traffic impacts which may be used by the City of Costa Mesa to leverage future transportation grants to implement the mitigations at the time they are needed.

On July 17, 2012, a Traffic Mitigation Agreement was presented to the City Council for consideration. The City Council discussed items such as inadequacies and errors in the text of the agreement, requested a number of clarifications/additions such as Consumer Price Index (CPI) measures to provide for an increase after two years and annually thereafter. Accordingly, and subsequent to the July 2012 Council meeting, additional negotiations through many

meetings with the developer resulted in a number of significant changes within the agreement, and provided answers to several outstanding questions and concerns.

The following summarizes further discussions with the developer and additional information on several issues raised by public and the City Council reflected in the agreement:

- **City's Rights – Section 5.1 of Draft Agreement was Eliminated**

Concerns were raised regarding the City waiving its rights for any future litigation with executing this agreement. The agreement has been revised to delete Section 5.1 in its entirety, which stated: "The City further agrees and acknowledges that the Project will not create and EIR does not identify any other adverse impacts on the City, environmental or otherwise. "

The City will now be able to retain all rights related to opposition to the overall project on any other issues **with the exception of traffic impacts and mitigations.**

- **Consumer Price Index (CPI) factor**

Section 4.2 of the agreement was revised to include a CPI Index. The amount of the Traffic Mitigation Fee shall be increased based upon percentage increases in the CPI Index with the first adjustment in two years from the date of the agreement and annually thereafter on the same date. The terms and conditions are specified in the agreement.

- **19<sup>th</sup> Street Connection**

The current circulation plan of the project shows a proposed two-lane road connection between 17<sup>th</sup> Street and 19<sup>th</sup> Street through North Bluff Road. However, a final decision has not been made, and Costa Mesa staff will continue negotiating this connection based on public input, and City Council direction.

- **Site Clean Up**

The developer intends to start site remediation upon approval from the Coastal Commission and annexation of the property into City of Newport Beach. This process is estimated to take approximately two to three years. It is also anticipated that the clean up of some of the open space areas will start concurrent with the oil fields.

- **Shade and Shadow Study**

A concern was raised regarding any potential shade and shadow impacts on residential units in Costa Mesa located north of the development. The EIR notes that no impacts are identified and further studies of the civil drawings confirm the same conclusion; therefore, the applicant will not be preparing additional studies.

- **Noise Mitigation related to the mobile home parks**

The developer has agreed to provide funding for the use of rubberized asphalt at the time of widening of 17<sup>th</sup> Street. **This funding may be used for other noise mitigation measures as the City sees fit.**

- **Haul Routes**

The EIR noted that there are no hazard levels (per state and federal standards) of any materials identified on the project site. Haul routes for any materials from the site will be coordinated with City of Costa Mesa Transportation Division in advance of the hauling activities.

- **Project timing**

The developer is anticipating commencing the development project by 2015.

**ALTERNATIVES CONSIDERED:**

The City Council may elect to not approve the attached Traffic Mitigation Agreement. This will potentially result in the Newport Banning Ranch development to occur without addressing the traffic impacts in Costa Mesa. However, this alternative will require the City to be responsible for implementation of improvement measures in the future using only City and grant revenues.

**FISCAL REVIEW:**

The Traffic Mitigation Agreement provides for \$4,388,483 in revenues to the City phased with the development of Newport Banning Ranch. These traffic mitigation funds will be used to implement mitigation measures identified in the Newport Banning Ranch DEIR for Costa Mesa as well as other traffic improvements in the City's General Plan Circulation Element in this area.

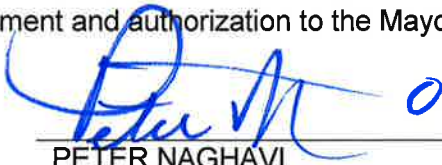
**LEGAL REVIEW:**

The City Attorney's office has reviewed the Traffic Mitigation Agreement and has provided comments, which have been incorporated. The City Attorney's office has approved the attached Agreement as to form.

**CONCLUSION:**

In late 2011, a draft Environmental Impact Report (DEIR) was completed for the Newport Banning Ranch project, which includes the development of 1,375 residential units, 75,000 square feet of neighborhood commercial uses, a 75-room resort hotel, and park amenities within the Newport Banning Ranch property. The DEIR identified traffic impacts at seven (7) intersections within the City of Costa Mesa. While this proposed project is outside Costa Mesa's legal jurisdiction, City of Costa Mesa staff met with the developer to review mitigation options. The attached Traffic Mitigation Agreement was prepared based on these discussions. The Agreement was also reviewed and approved by the City Attorney's office. According to the proposed Agreement, the developer will be responsible for contributing \$4,388,483 in traffic impact fees to the City of Costa Mesa based on the project's phasing. These funds represent the project's share of impacts on the Costa Mesa's transportation system and are determined to be reasonable. Staff requests City Council's approval of the Traffic Mitigation Agreement and authorization to the Mayor to execute the Agreement.

  
MINOO ASHABI, AIA  
Principal Planner

  
PETER NAGHAVI  
Economic and Development Director

Attachments:           1 - Draft Traffic Mitigation Agreement  
                              2 - Redlined Version of Previous Draft

cc:     Chief Executive Officer  
          Assistant Chief Executive Officer  
          Director of Economic & Development/Deputy CEO  
          City Attorney  
          Public Services Director  
          Transportation Services Manager  
          City Engineer  
          City Clerk (9)  
          Staff (7)  
          File (2)

## TRAFFIC MITIGATION AGREEMENT

This **TRAFFIC MITIGATION AGREEMENT** (“Agreement”) is made and entered into as of \_\_\_\_\_, 2013, by and among the City of Costa Mesa (the “City”), and Newport Banning Ranch LLC, a California limited liability company, its successors and assigns (“NBR”). The City and NBR are herein each a “Party” and collectively the “Parties.”

In consideration of mutual covenants and conditions contained in this Agreement, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by the Parties, the Parties agree as follows:

### 1.0 DEFINITIONS

In addition to the foregoing defined terms, the following defined terms apply to this Agreement.

1.1 **“Effective Date”** is defined in Section 20.

1.2 **“NBR”** means the developer, Newport Banning Ranch LLC, its successors and assigns.

1.3 **“Project”** is defined in Section 2.1 and described in Exhibit “A.”

1.4 **“Property”** means the property comprising the Newport Banning Ranch Site as depicted in Exhibit “A.”

1.5 **“Traffic Mitigation Fee”** means the fee in the amount of One Thousand Two Hundred Eighty Three Dollars (\$1,283.00) per residential unit constructed within the project.

### 2.0 RECITALS

2.1 NBR proposes to improve the Property in accordance with the Project approvals granted by the City of Newport Beach on July 23, 2012 (and pending review and approval by the California Coastal Commission) as follows:

- Environmental Impact Report No. ER2009-002 (SCH No. 2009031061)
- General Plan Amendment No. GP2008-008
- Code Amendment No. CA2008-004
- Planned Community Development Plan No. PC2008-002
- Master Development Plan No. MP2008-001
- Tentative Tract Map No. 17308
- Development Agreement No. DA2008-003

- Affordable Housing Implementation Plan No. AH2008-001
- Traffic Study No. TS2008-002

The 401-acre site will include 304 acres designated as open space and parks, and 97 acres that encompass the balance – providing for open space on 76% of the property and a maximum of 1,375 homes, 75,000 square-feet of neighborhood commercial and a 75-room coastal inn on the remaining 24% of the property.

2.2 The City of Newport Beach has certified Environmental Impact Report No. ER2009-002 (State Clearing House No. 2009031061) in connection with its consideration of the Project (the “EIR”).

2.3 The EIR has identified certain traffic impacts that may occur within the City and has identified certain mitigation measures that would reduce these impacts to a less than significant level (the “Mitigation Measures”). These mitigation measures are as follows:

- (a) Newport Boulevard – 19<sup>th</sup> Street: Addition of a southbound left-turn lane;
- (b) Newport Boulevard – Harbor Boulevard: Addition of a southbound through lane;
- (c) Newport Boulevard – 18<sup>th</sup> Street: Addition of a southbound through lane;
- (d) Newport Boulevard – 17<sup>th</sup> Street: Addition of a southbound through lane;
- (e) Superior Avenue – 17<sup>th</sup> Street: Addition of a westbound right-turn lane;
- (f) Pomona Avenue – 17<sup>th</sup> Street: Signalize intersection; and
- (g) Monrovia Avenue – 19<sup>th</sup> Street: Signalize intersection.

2.4 The City has adopted a fair share fee program applicable to projects within the City for the mitigation of project traffic impacts.

2.5 The **Parties** understand and agree that the EIR Traffic Study indicates that initiation of mitigation measures related to the project must be implemented in Costa Mesa in conjunction with the construction of the 300<sup>th</sup> residential unit. Nevertheless, in advance of this 300<sup>th</sup> residential unit threshold, the project will, pursuant to Section 4.2 below, pay Traffic Mitigation Fees for each requested residential building permit, totaling \$384,900 by issuance of the 300<sup>th</sup> building permit.

2.6 Even though the Project is not within the City and would not be subject to the City fair share program, the City and NBR agree that the project will have significant, yet mitigatable impacts in Costa Mesa. In order to mitigate the potential traffic impacts of the Project within the City, the Parties have entered into this Agreement. This Agreement will provide for funding and phasing of the implementation of the Mitigation Measures and other improvements based on Project development phasing.

3.0 **Incorporation of Definitions and Recitals.** The foregoing Definitions and Recitals are incorporated into this Agreement.

4.0 **Traffic Mitigation Program.**

4.1 In order to address the impacts of the Project on the City, NBR agrees to fund the cost of the Mitigation Measures in the total amount of up to Four Million Three Hundred Eighty Thousand Four Hundred Eighty Three Dollars (\$4,388,483.00), depending on the level of residential development within the Project, as set forth in this Section (the "Traffic Mitigation Program").

4.2 NBR shall pay a traffic mitigation fee in the amount of One Thousand Two Hundred Eighty Three Dollars (\$1,283.00) per residential unit constructed within the project (the "Traffic Mitigation Fee"). The fee shall be paid prior to the issuance of a building permit for each unit.

The amount of the Traffic Mitigation Fee shall be increased based upon percentage increases in the CPI Index. The first CPI adjustment to the Traffic Mitigation Fee shall occur on the second anniversary of the Agreement Date of this Agreement (the first "Adjustment Date") and subsequent CPI adjustments shall occur on each anniversary of the first Adjustment Date thereafter until expiration of this Agreement (each, an "Adjustment Date"). The amount of the CPI adjustment on the first Adjustment Date shall be the percentage increase in the CPI Index between the first anniversary of the Agreement Date and the second anniversary of the Agreement Date. The amount of the CPI adjustment on each subsequent Adjustment Date shall be the percentage increase between said Adjustment Date and the immediately preceding Adjustment Date. The amount of the percentage increase in the CPI Index on the applicable Adjustment Dates shall in each instance be calculated based on the then most recently available CPI Index figures such that, for example, if the first Adjustment Date occurs on July 1, 2015, and the most recently available CPI Index figure on that date is the CPI Index for May 2015 (2 months prior to the first Adjustment Date), the percentage increase in the CPI Index on the first Adjustment Date shall be calculated by comparing the CPI Index for May 2014 with the CPI Index for May 2015. In no event, however, shall application of the CPI Index on any Adjustment Date reduce the amount of the traffic mitigation fee (or unpaid portion thereof) below the amount in effect prior to that Adjustment Date. Notwithstanding any other provision set forth in this Agreement to the contrary, during the Term of this Agreement City shall not increase the Traffic Mitigation Fee except pursuant to the CPI Index as stated in this Section 4.2.

4.3 In addition to the Traffic Mitigation Fee, NBR shall pay lump sum fees at certain milestones during the build-out of the Project (the "Milestone Fees") as follows:

- (a) Prior to Issuance of 301<sup>st</sup> residential building permit -- \$500,000
- (b) Prior to Issuance of 601<sup>st</sup> residential building permit -- \$500,000
- (c) Prior to Issuance of 901<sup>st</sup> residential building permit -- \$750,000
- (d) Prior to Issuance of 1,201<sup>st</sup> residential building permit -- \$875,000

4.4 To address the identified Project Noise Impacts in the City, at such time as the Project opens for public travel its connection with 17<sup>th</sup> Street, NBR shall deposit with City funds equal to the improvement costs for a “rubberized” asphalt cap on 17<sup>th</sup> Street, as described in Mitigation Measure 4.12-5 of the Certified EIR for the Project. Said funds will be in accordance with a cost estimate prepared by a qualified civil engineer.

4.5 Prior to applying for any residential building permit, NBR, or its successors and assigns pursuant to Section 9 below, shall submit a schedule to the City detailing the projected timing of the issuance of building permits by the City of Newport Beach and will remit the payment of the Traffic Mitigation Fees and Milestone Fees, then due, prior to the issuance of building permits. Prior to issuance of each residential building permit by the City of Newport Beach, NBR shall obtain evidence from the City that all applicable fees under the Traffic Mitigation Program have been paid.

5.0 **Full and Complete Mitigation.** The City agrees that the payment of the Traffic Mitigation Fee and the Milestone Fees will result in full and complete mitigation of all of the Project traffic impacts within the City as identified in the EIR. Notwithstanding the foregoing, the City agrees that new traffic impacts caused by modifications to the existing City Circulation Element or as a result of new projects in the City requiring a General Plan amendment or new circulation improvements, shall not result in an increase in the mitigation provided for in this Agreement except as lawfully and reasonably required in connection with changes, modifications or amendments to the Project Approvals sought by NBR that increase the traffic impact on the City and to mitigate traffic impacts of the Project which were not and reasonably could not, have been anticipated at the time the City entered into this Agreement.

6.0 **Non-Interference.** With regard to traffic matters and the related traffic mitigation program described in this Agreement, the City will not oppose the approval of the Project or initiate any litigation based on, and with regards to traffic impacts/mitigations related to the Project Approvals or any subsequent Project Approvals including but not limited to the issuance of Coastal Development Permits, use permits or building permits so long as they are consistent with the Project as described in Section 2.1 above.

7.0 **Changes to Projects.** The Parties recognize that the Project will be subject to various regulatory approvals that may result in changes in building types, development footprint, unit count, density, proposed uses and in other substantive ways, and that such changes will not change their respective obligations hereunder except to the extent that they result in increased traffic impacts in the City. The Parties agree to cooperate with one another in good faith should changes in the Project result in increased impacts in the City and require modifications to the Traffic Mitigation Program in order to mitigate any increased traffic impacts. The Parties agree that the approval of any such modifications to the Traffic Mitigation Program will not be unreasonably withheld.

8.0 **Permits.** NBR will obtain all appropriate permits and approvals necessary to proceed with the Project.



8.1 NBR, or its agents or affiliates, are solely responsible for obtaining any Permits.

8.2 Subject to Sections 4 through 7 of this Agreement, the City will not oppose, interfere with, or object to NBR's application for any permits.

#### 9.0 **Default and Remedies.**

9.1 **Notice And Opportunity To Cure.** Before this Agreement may be terminated or action may be taken to obtain relief in a manner consistent with this Agreement, the Party seeking relief ("Non-Defaulting Party") shall comply with the notice and cure provisions of this Section 9.1. A Non-Defaulting Party in its discretion may elect to declare a default under this Agreement in accordance with the procedures hereinafter set forth for any failure or breach of any other Party ("Defaulting Party") to perform any material duty or obligation of said Defaulting Party in accordance with the terms of this Agreement. However, the Non-Defaulting Party must provide written notice ("Default Notice") to the Defaulting Party setting forth the nature of the breach or failure and the actions, if any, required by the Non-Defaulting Party to cure such breach or failure. The Defaulting Party shall be deemed in "default" of its obligations set forth in this Agreement if the Defaulting Party has failed to take action to cure the default within twenty (20) days after the date of such Default Notice (for monetary defaults), within thirty (30) days after the date of such Default Notice (for non-monetary defaults), or within such lesser time as may be specifically provided in this Agreement. If, however, a non-monetary default cannot be cured within such thirty (30) day period, as long as the Defaulting Party does each of the following, then the Defaulting Party shall not be deemed in breach of this Agreement:

- (i) within twenty (20) days of the Default Notice, notifies the Non-Defaulting Party in writing with a reasonable explanation as to the reasons the asserted default is not curable within the thirty (30) day period;
- (ii) within twenty (20) days of the Default Notice, notifies the Non-Defaulting Party of the Defaulting Party's proposed course of action to cure the default;
- (iii) promptly commences to cure the default within the thirty (30) day period;
- (iv) makes periodic reports to the Non-Defaulting Party as to the progress of the program of cure; and
- (v) diligently prosecutes such cure to completion.

9.2 **Remedies.** In the event of a default, the Non-Defaulting Party, at its option, may institute an action to cure, correct, or remedy such default, enjoin any threatened or attempted violation, enforce the terms of this Agreement by specific performance (including injunctive relief), or pursue any other remedy otherwise available.

#### 10.0 **Assignment.**

10.1 Right To Assign. NBR and its successors and assigns shall have the right to assign a portion or all of its rights under this Agreement to any person or entity that acquires an interest in said portion or all of the Property; provided that such person or entity assumes in writing all of the obligations of NBR under this Agreement applicable to the portion of the Property transferred and notifies City in writing of the same.

10.2 Assignee Subject To Terms Of Agreement. Following an assignment of this Agreement as provided in Section 10.1 above, the successor or assign shall be subject to the terms of this Agreement as it may apply to the portion of the Property transferred to the same extent as if the successor or assign were NBR. The burdens of this Agreement shall be binding upon, and the benefits of this Agreement shall inure to, all successors in interest to the Parties to this Agreement.

10.3 Release Upon Transfer. Upon an assignment as provided in Section 10.1 above, the NBR or a transferring successor shall be relieved of its legal duty to perform such future assigned obligations as may be applicable to the portion of the Property transferred, except to the extent NBR or a transferring successor is in default hereunder with respect to the particular assigned obligations prior to said transfer.

11.0 Attorneys' Fees. Each Party will bear its own attorneys' fees and costs incurred in connection with the negotiation, execution and implementation of its obligations under this Agreement. Should any lawsuit, action, or proceeding be brought to enforce, avoid, nullify, reform, rescind, or seek damages based on an alleged breach of this Agreement, or in any other way arising out of, related to or referencing this Agreement, then the prevailing Party or Parties in such a proceeding shall be entitled to be reimbursed by the other Party or Parties for all costs and expenses incurred as a result, whether or not ordinarily collectible, including but not limited to, reasonable attorneys' fees, expert witness fees and costs for the services rendered to such prevailing Party or Parties.

12.0 Entire Agreement. This Agreement embodies the entire understanding among the Parties and neither of the Parties shall be bound by any conditions, warranties, or representations other than as expressly stated in this Agreement.

13.0 Captions – Pronouns. Any titles, captions, or subheadings contained in this Agreement are for convenience only and shall not be deemed part of the context of this Agreement or considered in any interpretation or construction of this Agreement. Whenever the masculine, feminine or neuter genders are used herein, as required by the context or particular circumstance, they shall include each of the other genders as appropriate. Whenever the singular or plural numbers are used, they shall be deemed to be the other as required. Wherever the present or past tense is utilized in this Agreement and the context or circumstances require another interpretation, the present shall include the past and future, the future shall include the present, and the past shall include the present.

14.0 Consideration. The Parties hereby expressly acknowledge and agree that each and every term and condition of this Agreement is of the essence of this Agreement, constitutes a material part of the bargain for consideration without which this Agreement would not have been executed and is a material part of the Agreement.

15.0 **Modifications.** This Agreement may be amended or modified only in a writing executed by all of the Parties.

16.0 **Counterparts.** This Agreement shall be executed as two originals (one for each Party) and may be executed in several counterparts and all so executed shall constitute one agreement which will be binding on all the Parties hereto notwithstanding that all of the Parties are not signatory to the same counterpart.

17.0 **Representations and Warranties.** Each Party represents and warrants to the other Parties as follows:

17.1 Such Party has received independent legal advice from attorneys of its choice with respect to the advisability of making this Agreement and with respect to the advisability of executing this Agreement.

17.2 Except as is expressly stated in this Agreement, no Party has made any statement or representation to any other Party regarding any fact, which statement or representation is relied upon by such Party in entering into this Agreement. In connection with the execution of this Agreement or the making of the settlement and release provided for herein, such Party has not relied upon any statement, representation or promise of any other Party or their attorney not expressly contained herein.

17.3 The terms of this Agreement are contractual and are the result of negotiations among the Parties. Each Party has cooperated in the drafting and preparation of this Agreement. Hence, in any construction to be made of this Agreement, the same shall not be construed against any Party.

17.4 This Agreement has been carefully read by such Party and the contents thereof are known and understood by such Party, and this Agreement is signed freely by such Party.

18.0 **Warranty of Authority.** Each person whose signature is affixed hereto in a representative capacity represents and warrants that he or she is authorized to execute this Agreement on behalf of and to bind the Party on whose behalf his or her signature is affixed.

19.0 **Notices.** All notices shall be sent to the Parties at the following addresses:

To the City: City of Costa Mesa  
77 Fair Drive  
Post Office Box No. 1200  
Costa Mesa, California 92628-1200  
Attn: Thomas Hatch, Chief Executive Officer

With copy to: City of Costa Mesa  
77 Fair Drive  
Post Office Box No 1200  
Costa Mesa, California 92628-1200  
Attn: City Attorney

To NBR: Newport Banning Ranch LLC  
Attn: Michael A. Mohler  
1300 Quail Street, Suite 100  
Newport Beach, CA 92660

With copy to: George L. Basye  
Aera Energy LLC  
3030 Saturn Street, Suite 101  
Brea, CA 92821

With copy to: Roger A. Grable  
Manatt, Phelps and Phillips LLP  
695 Town Center Drive, 14th Floor  
Cost Mesa, California 92626

20.0 **Effective Date.** This Agreement shall become effective upon the execution of this Agreement by both Parties.

21.0 **Severability.** In the event that any provision or any part of any provision of this Agreement shall be void or unenforceable for any reason whatsoever, then such provision shall be stricken and of no force and effect; provided that no Party would be deprived of a material consideration by operation of this section, the remaining provisions of this Agreement, will continue in full force and effect, and to the extent required, shall be modified to preserve their validity.

22.0 **Applicable Law.** Any legal action pertaining to this Agreement and the obligations of the Parties shall be governed by the laws of the State of California. The Parties agree that any legal action brought to enforce the provisions of this Agreement or otherwise, is subject to the jurisdiction of the Orange County Superior Court.

23.0 **Amendments and Waivers.** Any modification to this Agreement shall be in writing signed by both Parties. Further, any waiver by either Party of any obligation of the other Party shall not limit a Party's right to seek recourse for future violations of the other Party.

24.0 **Statutory Inapplicability.** NBR acknowledges and agrees that Government Code Section 65864 et. seq. and Government Code Section 66000 et. seq. is not applicable to this Agreement.

25.0 **Indemnification and Hold Harmless.** NBR agrees to defend, indemnify, hold free and harmless the City, its elected officials, officers, agents and employees, at NBR's sole expense, from and against any and all claims, actions, suits or other legal proceedings brought against the City, its elected officials, officers, agents and employees arising out of the performance of NBR, its assigns, successors, employees, and/or authorized subcontractors, of any physical work undertaken pursuant to this Agreement. The defense obligation provided for hereunder shall apply without any advance showing of negligence or wrongdoing by NBR, its

assigns, successors, employees, and/or authorized subcontractors, but shall be required whenever any claim, action, complaint, or suit asserts as its basis the negligence, errors, omissions or misconduct of the NBR, its assigns, successors, employees, and/or authorized subcontractors, and/or whenever any claim, action, complaint or suit asserts liability against the City, its elected officials, officers, agents and employees based upon the work performed by NBR, its assigns, successors, employees, and/or authorized subcontractors under this Agreement, whether or not NBR, its assigns, successors, employees, and/or authorized subcontractors are specifically named or otherwise asserted to be liable. Notwithstanding the foregoing, NBR shall not be liable for the defense or indemnification of the City for claims, actions, complaints or suits arising out of the sole active negligence or willful misconduct of the City.

*(Signature blocks begin on following page)*

Dated: \_\_\_\_\_, 201\_\_

“NBR”

Newport Banning Ranch LLC, a California limited liability company

By: \_\_\_\_\_

Name: George L. Basye

Title: Manager

“City”

City of Costa Mesa

By: \_\_\_\_\_

Mayor

Attest:

By: \_\_\_\_\_

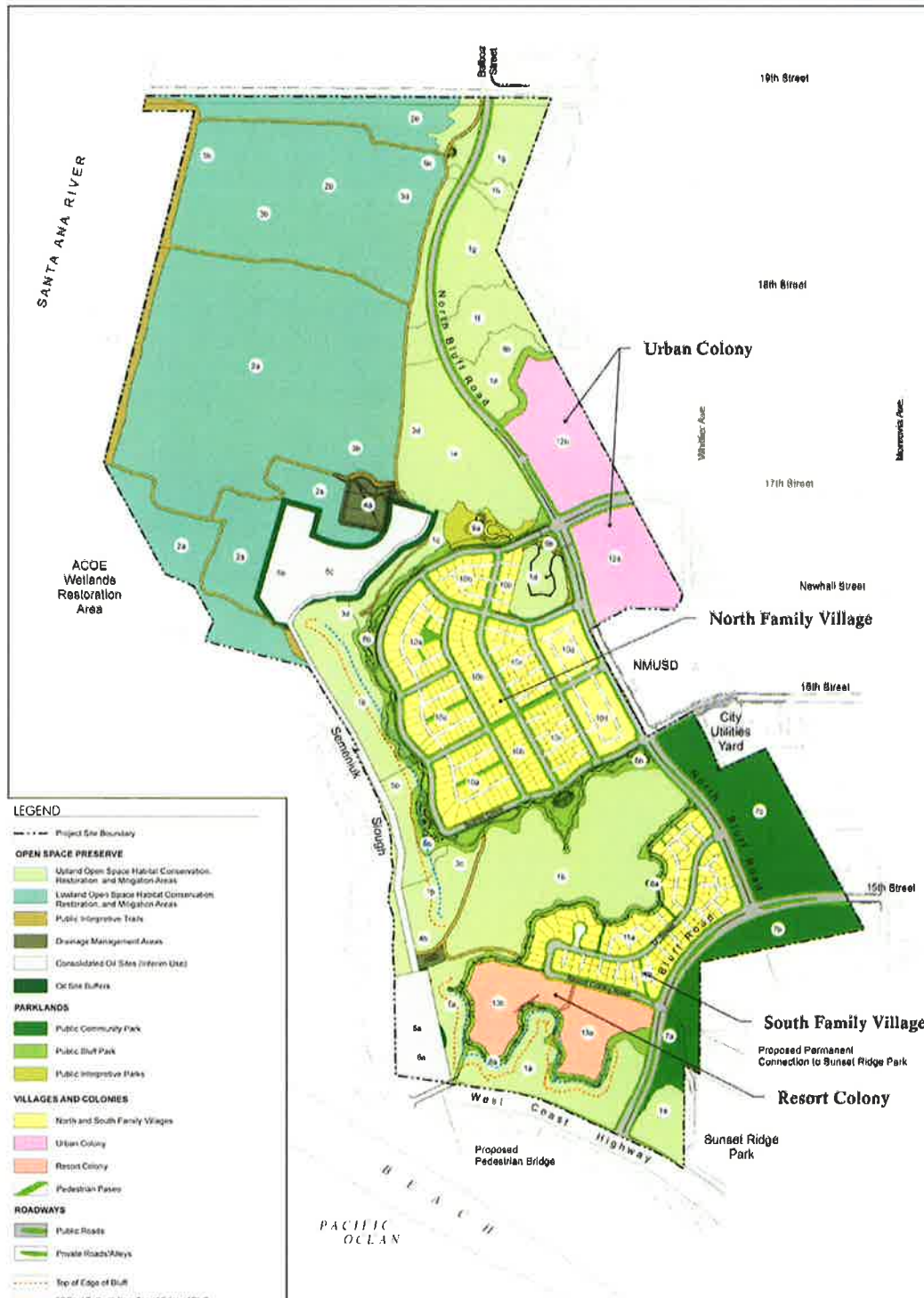
City Clerk

Approved as to Form:

By: \_\_\_\_\_

City Attorney

# Exhibit A – Master Development Plan



## TRAFFIC MITIGATION AGREEMENT

This **TRAFFIC MITIGATION AGREEMENT** ("Agreement") is made and entered into as of \_\_\_\_\_, 2013, by and among the City of Costa Mesa (the "City"), and Newport Banning Ranch LLC, a California limited liability company, its successors and assigns ("NBR"). The City and NBR are herein each a "Party" and collectively the "Parties."

In consideration of mutual covenants and conditions contained in this Agreement, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by the Parties, the Parties agree as follows:

### 1.0 DEFINITIONS

In addition to the foregoing defined terms, the following defined terms apply to this Agreement.

1.1 **"Effective Date"** is defined in Section 20.

1.2 **"NBR"** means the developer, Newport Banning Ranch LLC, its successors and assigns.

1.3 **"Project"** is defined in Section 2.1 and described in Exhibit "A."

1.4 **"Property"** means the property comprising the Newport Banning Ranch Site as depicted in Exhibit "A."

1.5 **"Traffic Mitigation Fee"** means the fee in the amount of One Thousand Two Hundred Eighty Three Dollars (\$1,283.00) per residential unit constructed within the project.

### 2.0 RECITALS

2.1 NBR proposes to improve the Property in accordance with the Project approvals granted by the City of Newport Beach on July 23, 2012 (and pending review and approval by the California Coastal Commission) as follows:

- Environmental Impact Report No. ER2009-002 (SCH No. 2009031061)
- General Plan Amendment No. GP2008-008
- Code Amendment No. CA2008-004
- Planned Community Development Plan No. PC2008-002
- Master Development Plan No. MP2008-001
- Tentative Tract Map No. 17308
- Development Agreement No. DA2008-003



- Affordable Housing Implementation Plan No. AH2008-001
- Traffic Study No. TS2008-002

The 401-acre site will include 304 acres designated as open space and parks, and 97 acres that encompass the balance – providing for open space on 76% of the property and a maximum of 1,375 homes, 75,000 square-feet of neighborhood commercial and a 75-room coastal inn on the remaining 24% of the property.

2.2 The City of Newport Beach has certified Environmental Impact Report No. ER2009-002 (State Clearing House No. 2009031061) in connection with its consideration of the Project (the “EIR”).

2.3 The EIR has identified certain traffic impacts that may occur within the City and has identified certain mitigation measures that would reduce these impacts to a less than significant level (the “Mitigation Measures”). These mitigation measures are as follows:

- (a) Newport Boulevard – 19<sup>th</sup> Street: Addition of a southbound left-turn lane;
- (b) Newport Boulevard – Harbor Boulevard: Addition of a southbound through lane;
- (c) Newport Boulevard – 18<sup>th</sup> Street: Addition of a southbound through lane;
- (d) Newport Boulevard – 17<sup>th</sup> Street: Addition of a southbound through lane;
- (e) Superior Avenue – 17<sup>th</sup> Street: Addition of a westbound right-turn lane;
- (f) Pomona Avenue – 17<sup>th</sup> Street: Signalize intersection; and
- (g) Monrovia Avenue – 19<sup>th</sup> Street: Signalize intersection.

2.4 The City has adopted a fair share fee program applicable to projects within the City for the mitigation of project traffic impacts.

2.5 The **Parties** understand and agree that the EIR Traffic Study indicates that initiation of mitigation measures related to the project must be implemented in Costa Mesa in conjunction with the construction of the 300<sup>th</sup> residential unit. Nevertheless, in advance of this 300<sup>th</sup> residential unit threshold, the project will, pursuant to Section 4.2 below, pay Traffic Mitigation Fees for each requested residential building permit, totaling \$384,900 by issuance of the 300<sup>th</sup> building permit.

2.6 Even though the Project is not within the City and would not be subject to the City fair share program, the City and NBR agree that the project will have significant, yet mitigatable impacts in Costa Mesa. In order to mitigate the potential traffic impacts of the Project within the City, the Parties have entered into this Agreement. This Agreement will provide for funding and phasing of the implementation of the Mitigation Measures and other improvements based on Project development phasing.

3.0 **Incorporation of Definitions and Recitals.** The foregoing Definitions and Recitals are incorporated into this Agreement.

4.0 **Traffic Mitigation Program.**

4.1 In order to address the impacts of the Project on the City, NBR agrees to fund the cost of the Mitigation Measures in the total amount of up to Four Million Three Hundred Eighty Thousand Four Hundred Eighty Three Dollars (\$4,388,483.00), depending on the level of residential development within the Project, as set forth in this Section (the "Traffic Mitigation Program").

4.2 NBR shall pay a traffic mitigation fee in the amount of One Thousand Two Hundred Eighty Three Dollars (\$1,283.00) per residential unit constructed within the project (the "Traffic Mitigation Fee"). The fee shall be paid prior to the issuance of a building permit for each unit.

The amount of the Traffic Mitigation Fee shall be increased based upon percentage increases in the CPI Index. The first CPI adjustment to the Traffic Mitigation Fee shall occur on the fifth anniversary of the Agreement Date of this Agreement (the first "Adjustment Date") and subsequent CPI adjustments shall occur on each anniversary of the first Adjustment Date thereafter until expiration of the Term of this Agreement (each, an "Adjustment Date"). The amount of the CPI adjustment on the first Adjustment Date shall be the percentage increase in the CPI Index between the fourth anniversary of the Agreement Date and the fifth anniversary of the Agreement Date. The amount of the CPI adjustment on each subsequent Adjustment Date shall be the percentage increase between said Adjustment Date and the immediately preceding Adjustment Date. The amount of the percentage increase in the CPI Index on the applicable Adjustment Dates shall in each instance be calculated based on the then most recently available CPI Index figures such that, for example, if the first Adjustment Date occurs on July 1, 2018, and the most recently available CPI Index figure on that date is the CPI Index for May 2018 (2 months prior to the first Adjustment Date), the percentage increase in the CPI Index on the first Adjustment Date shall be calculated by comparing the CPI Index for May 2017 with the CPI Index for May 2018. In no event, however, shall application of the CPI Index on any Adjustment Date reduce the amount of the traffic mitigation fee (or unpaid portion thereof) below the amount in effect prior to that Adjustment Date. Notwithstanding any other provision set forth in this Agreement to the contrary, during the Term of this Agreement City shall not increase the Traffic Mitigation Fee except pursuant to the CPI Index as stated in this Section 4.2.

~~Notwithstanding any other provision set forth in this Agreement to the contrary, during the Term of this Agreement City shall not increase the traffic mitigation fee.~~

4.3 In addition to the Traffic Mitigation Fee, NBR shall pay lump sum fees at certain milestones during the build-out of the Project (the "Milestone Fees") as follows:

- (a) Prior to Issuance of 301<sup>st</sup> residential building permit -- \$500,000
- (b) Prior to Issuance of 601<sup>st</sup> residential building permit -- \$500,000
- (c) Prior to Issuance of 901<sup>st</sup> residential building permit -- \$750,000
- (d) Prior to Issuance of 1,201<sup>st</sup> residential building permit -- \$875,000

4.4 To address the identified Project Noise Impacts in the City, at such time as the Project opens for public travel its connection with 17<sup>th</sup> Street, NBR shall deposit with City funds equal to the improvement costs for a “rubberized” asphalt cap on 17<sup>th</sup> Street, as described in Mitigation Measure 4.12-5 of the Certified EIR for the Project. Said funds will be in accordance with a cost estimate prepared by a qualified civil engineer.

4.5 Prior to applying for any residential building permit, NBR, or its successors and assigns pursuant to Section 9 below, shall submit a schedule to the City detailing the projected timing of the issuance of building permits by the City of Newport Beach and will remit the payment of the Traffic Mitigation Fees and Milestone Fees, then due, prior to the issuance of building permits. Prior to issuance of each residential building permit by the City of Newport Beach, NBR shall obtain evidence from the City that all applicable fees under the Traffic Mitigation Program have been paid.

#### ~~5.0~~ **Full and Complete Mitigation.**

5.0 The City agrees that the payment of the Traffic Mitigation Fee and the Milestone Fees will result in full and complete mitigation of all of the Project traffic impacts within the City as identified in the EIR. Notwithstanding the foregoing, the City agrees that new traffic impacts caused by modifications to the existing City Circulation Element or as a result of new projects in the City requiring a General Plan amendment or new circulation improvements, shall not result in an increase in the mitigation provided for in this Agreement except as lawfully and reasonably required in connection with changes, modifications or amendments to the Project Approvals sought by ~~Developer~~ NBR that increase the traffic impact on the City and to mitigate traffic impacts of the Project which were not and reasonably could not, have been anticipated at the time the City entered into this Agreement.

~~6.1 The City further agrees and acknowledges that the Project will not create and EIR does not identify any other adverse impacts on the City, environmental or otherwise.~~

6.0 **Non-Interference.** With regard to traffic matters and the related traffic mitigation program described in this Agreement, the City will not oppose the approval of the Project or initiate any litigation based on, and with regards to traffic impacts/mitigations related to the Project Approvals or any subsequent Project Approvals including but not limited to the issuance of Coastal Development Permits, use permits or building permits so long as they are consistent with the Project as described in Section 2.1 above.

7.0 **Changes to Projects.** The Parties recognize that the Project will be subject to various regulatory approvals that may result in changes in building types, development footprint, unit count, density, proposed uses and in other substantive ways, and that such changes will not change their respective obligations hereunder except to the extent that they result in increased traffic impacts in the City. The Parties agree to cooperate with one another in good faith should changes in the Project result in increased impacts in the City and require modifications to the Traffic Mitigation Program in order to mitigate any increased traffic impacts. The Parties agree

that the approval of any such modifications to the Traffic Mitigation Program will not be unreasonably withheld.

8.0 **Permits.** NBR will obtain all appropriate permits and approvals necessary to proceed with the Project.

8.1 NBR, or its agents or affiliates, are solely responsible for obtaining any Permits.

8.2 Subject to Sections 4 through 7 of this Agreement, the City will not oppose, interfere with, or object to NBR's application for any permits.

9.0 **Default and Remedies.**

9.1 **Notice And Opportunity To Cure.** Before this Agreement may be terminated or action may be taken to obtain relief in a manner consistent with this Agreement, the Party seeking relief ("Non-Defaulting Party") shall comply with the notice and cure provisions of this Section 9.1. A Non-Defaulting Party in its discretion may elect to declare a default under this Agreement in accordance with the procedures hereinafter set forth for any failure or breach of any other Party ("Defaulting Party") to perform any material duty or obligation of said Defaulting Party in accordance with the terms of this Agreement. However, the Non-Defaulting Party must provide written notice ("Default Notice") to the Defaulting Party setting forth the nature of the breach or failure and the actions, if any, required by the Non-Defaulting Party to cure such breach or failure. The Defaulting Party shall be deemed in "default" of its obligations set forth in this Agreement if the Defaulting Party has failed to take action to cure- the default within twenty (20) days after the date of such Default Notice (for monetary defaults), within thirty (30) days after the date of such Default Notice (for non-monetary defaults), or within such lesser time as may be specifically provided in this Agreement. If, however, a non-monetary default cannot be cured within such thirty (30) day period, as long as the Defaulting Party does each of the following, then the Defaulting Party shall not be deemed in breach of this Agreement:

(i) within twenty (20) days of the Default Notice, notifies the Non-Defaulting Party in writing with a reasonable explanation as to the reasons the asserted default is not curable within the thirty (30) day period;

(ii) within twenty (20) days of the Default Notice, notifies the Non-Defaulting Party of the Defaulting Party's proposed course of action to cure the default;

(iii) promptly commences to cure the default within the thirty (30) day period;

(iv) makes periodic reports to the Non-Defaulting Party as to the progress of the program of cure; and

(v) diligently prosecutes such cure to completion.

9.2 **Remedies.** In the event of a default, the Non-Defaulting Party, at its option, may institute an action to cure, correct, or remedy such default, enjoin any threatened or

attempted violation, enforce the terms of this Agreement by specific performance (including injunctive relief), or pursue any other remedy otherwise available.

#### 10.0 **Assignment.**

10.1 **Right To Assign.** NBR and its successors and assigns shall have the right to assign a portion or all of its rights under this Agreement to any person or entity that acquires an interest in said portion or all of the Property; provided that such person or entity assumes in writing all of the obligations of NBR under this Agreement applicable to the portion of the Property transferred and notifies City in writing of the same.

10.2 **Assignee Subject To Terms Of Agreement.** Following an assignment of this Agreement as provided in Section 10.1 above, the successor or assign shall be subject to the terms of this Agreement as it may apply to the portion of the Property transferred to the same extent as if the successor or assign were NBR. The burdens of this Agreement shall be binding upon, and the benefits of this Agreement shall inure to, all successors in interest to the Parties to this Agreement.

10.3 **Release Upon Transfer.** Upon an assignment as provided in Section 10.1 above, the NBR or a transferring successor shall be relieved of its legal duty to perform such future assigned obligations as may be applicable to the portion of the Property transferred, except to the extent NBR or a transferring successor is in default hereunder with respect to the particular assigned obligations prior to said transfer.

11.0 **Attorneys' Fees.** Each Party will bear its own attorneys' fees and costs incurred in connection with the negotiation, execution and implementation of its obligations under this Agreement. Should any lawsuit, action, or proceeding be brought to enforce, avoid, nullify, reform, rescind, or seek damages based on an alleged breach of this Agreement, or in any other way arising out of, related to or referencing this Agreement, then the prevailing Party or Parties in such a proceeding shall be entitled to be reimbursed by the other Party or Parties for all costs and expenses incurred as a result, whether or not ordinarily collectible, including but not limited to, reasonable attorneys' fees, expert witness fees and costs for the services rendered to such prevailing Party or Parties.

12.0 **Entire Agreement.** This Agreement embodies the entire understanding among the Parties and neither of the Parties shall be bound by any conditions, warranties, or representations other than as expressly stated in this Agreement.

13.0 **Captions – Pronouns.** Any titles, captions, or subheadings contained in this Agreement are for convenience only and shall not be deemed part of the context of this Agreement or considered in any interpretation or construction of this Agreement. Whenever the masculine, feminine or neuter genders are used herein, as required by the context or particular circumstance, they shall include each of the other genders as appropriate. Whenever the singular or plural numbers are used, they shall be deemed to be the other as required. Wherever the present or past tense is utilized in this Agreement and the context or circumstances require another interpretation, the present shall include the past and future, the future shall include the present, and the past shall include the present.



14.0 **Consideration.** The Parties hereby expressly acknowledge and agree that each and every term and condition of this Agreement is of the essence of this Agreement, constitutes a material part of the bargain for consideration without which this Agreement would not have been executed and is a material part of the Agreement.

15.0 **Modifications.** This Agreement may be amended or modified only in a writing executed by all of the Parties.

16.0 **Counterparts.** This Agreement shall be executed as two originals (one for each Party) and may be executed in several counterparts and all so executed shall constitute one agreement which will be binding on all the Parties hereto notwithstanding that all of the Parties are not signatory to the same counterpart.

17.0 **Representations and Warranties.** Each Party represents and warrants to the other Parties as follows:

17.1 Such Party has received independent legal advice from attorneys of its choice with respect to the advisability of making this Agreement and with respect to the advisability of executing this Agreement.

17.2 Except as is expressly stated in this Agreement, no Party has made any statement or representation to any other Party regarding any fact, which statement or representation is relied upon by such Party in entering into this Agreement. In connection with the execution of this Agreement or the making of the settlement and release provided for herein, such Party has not relied upon any statement, representation or promise of any other Party or their attorney not expressly contained herein.

17.3 The terms of this Agreement are contractual and are the result of negotiations among the Parties. Each Party has cooperated in the drafting and preparation of this Agreement. Hence, in any construction to be made of this Agreement, the same shall not be construed against any Party.

17.4 This Agreement has been carefully read by such Party and the contents thereof are known and understood by such Party, and this Agreement is signed freely by such Party.

18.0 **Warranty of Authority.** Each person whose signature is affixed hereto in a representative capacity represents and warrants that he or she is authorized to execute this Agreement on behalf of and to bind the Party on whose behalf his or her signature is affixed.

19.0 **Notices.** All notices shall be sent to the Parties at the following addresses:

To the City:	City of Costa Mesa
	77 Fair Drive
	Post Office Box No. 1200
	Costa Mesa, California 92628-1200
	Attn: Thomas Hatch, Chief Executive Officer

With copy to: City of Costa Mesa  
77 Fair Drive  
Post Office Box No 1200  
Costa Mesa, California 92628-1200  
Attn: City Attorney

To NBR: Newport Banning Ranch LLC  
Attn: Michael A. Mohler  
1300 Quail Street, Suite 100  
Newport Beach, CA 92660

With copy to: George L. Basye  
Aera Energy LLC  
3030 Saturn Street, Suite 101  
Brea, CA 92821

With copy to: Roger A. Grable  
Manatt, Phelps and Phillips LLP  
695 Town Center Drive, 14th Floor  
Cost Mesa, California 92626

20.0 **Effective Date.** This Agreement shall become effective upon the execution of this Agreement by both Parties.

21.0 **Severability.** In the event that any provision or any part of any provision of this Agreement shall be void or unenforceable for any reason whatsoever, then such provision shall be stricken and of no force and effect; provided that no Party would be deprived of a material consideration by operation of this section, the remaining provisions of this Agreement, will continue in full force and effect, and to the extent required, shall be modified to preserve their validity.

22.0 **Applicable Law.** Any legal action pertaining to this Agreement and the obligations of the Parties shall be governed by the laws of the State of California. The Parties agree that any legal action brought to enforce the provisions of this Agreement or otherwise, is subject to the jurisdiction of the Orange County Superior Court.

23.0 **Amendments and Waivers.** Any modification to this Agreement shall be in writing signed by both Parties. Further, any waiver by either Party of any obligation of the other Party shall not limit a Party's right to seek recourse for future violations of the other Party.

24.0 **Statutory Inapplicability.** ~~Developer~~ NBR acknowledges and agrees that Government Code Section 65864 et. seq. and Government Code Section 66000 et. seq. is not applicable to this Agreement.

25.0 **Indemnification and Hold Harmless.** NBR agrees to defend, indemnify, hold free and harmless the City, its elected officials, officers, agents and employees, at NBR's sole expense, from and against any and all claims, actions, suits or other legal proceedings brought against the City, its elected officials, officers, agents and employees arising out of the

performance of NBR, its assigns, successors, employees, and/or authorized subcontractors, of any physical work undertaken pursuant to this Agreement. The defense obligation provided for hereunder shall apply without any advance showing of negligence or wrongdoing by NBR, its assigns, successors, employees, and/or authorized subcontractors, but shall be required whenever any claim, action, complaint, or suit asserts as its basis the negligence, errors, omissions or misconduct of the NBR, its, assigns, successors, employees, and/or authorized subcontractors, and/or whenever any claim, action, complaint or suit asserts liability against the City, its elected officials, officers, agents and employees based upon the work performed by NBR, its assigns, successors, employees, and/or authorized subcontractors under this Agreement, whether or not NBR, its assigns, successors, employees, and/or authorized subcontractors are specifically named or otherwise asserted to be liable. Notwithstanding the foregoing, NBR shall not be liable for the defense or indemnification of the City for claims, actions, complaints or suits arising out of the sole active negligence or willful misconduct of the City.

*(Signature blocks begin on following page)*



Dated: \_\_\_\_\_, 201\_\_

“NBR”

Newport Banning Ranch LLC, a California limited liability company

By: \_\_\_\_\_

Name: George L. Basye

Title: Manager

“City”

City of Costa Mesa

By: \_\_\_\_\_

Mayor

Attest:

By: \_\_\_\_\_

City Clerk

Approved as to Form:

By: \_\_\_\_\_

City Attorney

# Exhibit A – Master Development Plan

